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No. 90-1223

In The

Supreme Court of the United States

October Term, 1990

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

PATRICIA RAMIREZ-RIVAS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(3) and 5 U.S.C. § 504(a)(1), authorizes the award of attorneys fees and expenses for proceedings before the Board of Immigration Appeals.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

In 1983, Respondent Patricia Ramirez-Rivas, a native of El Salvador, fled her country after numerous members of her family were assassinated and tortured by government security forces. She entered the United States without inspection and was subsequently placed in deportation proceedings. Appendix to Petitioner's Petition for a Writ of Certiorari (hereinafter "Pet.'s App.") at 4a-6a.

The Immigration Judge denied her requests for political asylum and withholding of deportation. On appeal, the Board of Immigration Appeals (hereinafter "BIA" or "Board") also denied Ms. Ramirez-Rivas' requests. On March 29, 1990 – after seven years of litigation – the Ninth Circuit Court of Appeals reversed the BIA and held that Ms. Ramirez-Rivas had established both a clear probability and a well-founded fear of persecution. Pet's App. at 3a-4a. The Court ordered that withholding of deportation be granted, and remanded the case to the BIA for its exercise of discretion on the asylum claim. On June 14, 1990, the BIA granted asylum and withholding of deportation.

The Court held that the Immigration and Naturalization Service (hereinafter "INS") had "misread" and "ignore[d]" past precedent in pressing its argument that Ms. Ramirez-Rivas should be denied asylum because, unlike her, her relatives who had suffered at the hands of the government had been involved in guerrilla activity. Pet.'s App. at 9a. In discussing the INS' arguments, the Court found both its premises and its logic "faulty." Pet.'s App. at 11a, 17a.

Respondent then moved for attorneys fees and costs pursuant to the Equal Access to Justice Act (hereinafter "EAJA"), seeking recovery of litigation costs for work before the Board of Immigration Appeals and the Circuit Court of Appeals. On October 10, 1990, the Court granted respondent's motion for the full amount requested, holding that the INS had not carried its burden to demonstrate that its actions were substantially justified. Pet.'s App. at 1a.

In January of this year, the Solicitor General submitted to this Court a petition for a writ of certiorari on behalf of the INS. The petition presents the question of whether the Equal Access to Justice Act "permits an award of attorneys fees for work performed in connection with administrative deportation proceedings." INS Petition at (I).

REASONS FOR DENYING THE WRIT

Administrative deportation proceedings can be divided into two distinct phases. The deportation hearing itself is conducted by an immigration judge pursuant to 8 U.S.C. § 1252(b), Immigration and Nationality Act (hereinafter "INA") § 242(b). The appeal from the decision of the Immigration Judge, however, is to the Board of Immigration Appeals. The Board was created by regulation (*see* 8 C.F.R. § 3.1 et seq.) and proceedings before it are *not* within the purview of § 242(b).

At issue in the instant case is whether EAJA fees may be awarded for work performed in proceedings before the Board of Immigration Appeals. There is no conflict among the circuits as to this precise issue. In fact, no court has yet had to decide whether EAJA fees may be awarded for proceedings before the Board, separate and apart from the issue of whether fees may be awarded for work performed in a deportation hearing before an Immigration Judge. In addition, in order to decide the instant case, this Court would be forced to resolve issues which have yet to be sufficiently considered by the lower courts. Thus, there is no reason for the Court to grant the writ of certiorari in the case at bar.

1. There is no conflict among the circuits as to the precise issue of whether EAJA fees may be awarded for proceedings before the Board of Immigration Appeals. Petitioner cites *Ardestani v. United States Dep't. of Justice, INS*, 904 F.2d 1505 (11th Cir. 1990) and *Clarke v. INS*, 904 F.2d 172 (3d Cir. 1990), to support its contention that there is a conflict among the circuits. However, both of those cases concerned EAJA fees only for work performed in deportation hearings before an immigration judge. The applicability of EAJA to proceedings before the BIA, which conducts a *de novo* review, was not at issue in either of those cases.

The reasoning used by the courts in *Ardestani* and *Clarke* to find that EAJA awards are not authorized in deportation hearings does not apply in the context of BIA proceedings. Both the Third and the Eleventh Circuits relied on this Court's holding in *Marcello v. Bonds*, 349 U.S. 302 (1955), to find that the Administrative Procedure Act ("APA"), 5 U.S.C. § 554 et seq., does not govern deportation proceedings and that EAJA, therefore, does not apply to those proceedings. Even if this Court were to find that *Marcello* had relevance to the issue of the applicability of EAJA to deportation hearings before an Immigration Judge, the reasoning of *Marcello* cannot be used to conclude that EAJA does not apply to proceedings before the BIA. *Marcello* concerned only deportation hearings and did not address the issue of whether the APA governs BIA proceedings.

Upon examination, in fact, the reasoning in *Marcello* cannot be extended to cover BIA proceedings. In *Marcello*, this Court reasoned that, because Congress provided for

specific procedures for deportation hearings in the Immigration and Nationality Act (hereinafter "INA"), it evidenced its intent to replace the more general procedures provided in the APA with the specific procedures for deportation hearings set forth in the INA. *Marcello, supra,* at 308-09. The Court held that, where there was a conflict between the hearing provisions of the INA and those of the APA, the INA would control. *Ibid.*

In contrast to the specific provisions it enacted relevant to deportation hearings, however, Congress did not set out *any* procedures for proceedings before the BIA, which is not provided for by statute at all. Thus, whatever merit, if any, *Ardestani* and *Clarke* may have as to proceedings before an Immigration Judge, those decisions have no bearing on the issues in this case, which involves proceedings only before the BIA.

Moreover, in reaching its decision in *Marcello,* this Court relied on the language in Section 242(b) of the INA, 8 U.S.C. § 1252(b), that "[t]he procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." *Marcello, supra,* at 309. Section 242(b) applies only to proceedings before the Immigration Judge, however, not proceedings before the BIA. Thus, *Marcello* is not controlling here.

The holdings in *Ardestani* and *Clarke,* both of which relied on *Marcello,* as to EAJA's applicability to deportation hearings do not, therefore, bear on the issue of EAJA's applicability to BIA proceedings which is the issue presented in the instant case. Since this issue is distinct from that presented in *Ardestani* and *Clarke,* there is simply no conflict among the circuit courts on the

issue. It would be inappropriate, therefore, for the Court to grant the writ of certiorari for the reasons requested by the government.

2. The Court should also deny the writ of certiorari since the disposition of this case would depend on the resolution of the issue of whether the APA governs BIA proceedings, an issue yet to be sufficiently considered by the lower courts.[1]

In the cases cited by the government, *Ardestani* and *Clarke*, the courts rejected the Ninth Circuit's holding in *Escobar-Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988). Those courts stated that in *Escobar-Ruiz*, the Ninth Circuit held that, given the purpose of EAJA, the EAJA language "an adjudication under section 554" could mean an adjudication "as defined by" the APA as well as "governed by" the APA. *Ardestani*, 904 F.2d at 1510-11; *Clarke*, 904 F.2d at 175-8. Disagreeing with the Ninth Circuit in *Escobar-Ruiz*, those courts held that only the narrower "governed by" interpretation was correct. The courts relied on *Marcello* to hold that deportation proceedings are not governed by the APA and, thus, that EAJA does not apply. *Ardestani, supra*, at 1511; *Clarke, supra*, at 174.

Respondent believes that *Escobar-Ruiz* was correctly decided and should guide this Court's decision both in the instant case and in *Ardestani*. However, even if this

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[1] The Third and Fifth Circuit Courts of Appeals have stated that the APA does not govern BIA proceedings, but both did so in a non-EAJA context and neither addressed the issues raised herein. *Giambanco v. Immigration and Nat. Service*, 531 F.2d 141 (3rd Cir. 1976) (*but see* dissent by Judge Gibbons, *id.* at 149); *Ho Chong Tsao v. I.N.S.*, 538 F.2d 667 (5th Cir. 1976).

Court were to affirm the Eleventh Circuit's decision in *Ardestani*, it would not resolve the fundamental issue in this case – not relevant in *Ardestani* – of whether the APA governs BIA proceedings. Since this issue has yet to be adequately considered by the lower courts, this Court should deny the writ of certiorari and decline at this time to decide that issue in the context of this petition.

3. BIA proceedings must be held to be governed by the APA. Section 554(a) of the APA states that the section will apply "in every case of adjudication required by statute to be determined on the record after an opportunity for an agency hearing." Clearly, the formal hearing the INA requires prior to deportation meets the § 554 definition. Thus, normally the APA would apply to a deportation hearing. However, *Marcello* held that Congress, by setting out specific procedures for deportation proceedings, intended that those procedures should supersede the ones it established in the APA. *Marcello, supra,* at 310.

Marcello teaches that the APA will not govern immigration proceedings only where the APA is expressly superseded by the INA or where there is a conflict between the provisions of the APA and those of the INA. Thus, where the INA does not set out specific procedures for certain immigration proceedings, the APA controls those proceedings. This construction is in accordance with § 559 of the APA and this Court's command in *Marcello* that "[e]xemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in § 12 [now § 559] of the Act that modifications must be express . . . " *Marcello, supra,* at 310. Such a construction would also be consistent with the Court's holding in *Shaughnessy v. Pedreiro,* 349 U.S. 48

(1955), where the Court, relying on the language of then § 12, found that the APA provisions regarding judicial review governed deportation proceedings. *See also Wong Wing Hang v. INS*, 360 F.2d 715, 717 (2d Cir. 1966) (APA governs judicial review of suspension of deportation proceeding); *Escobar-Ruiz, supra*, at 1025 ("*Marcello* . . . held only that the INA 'supersedes' the hearing provisions of the INA – that is, that when the two statutes diverge, the more specialized hearing provisions of the INA govern.").

Thus, under *Marcello*, proceedings before the BIA must be found to be governed by the APA. In contrast to deportation hearings, Congress has set out no specific procedures governing proceedings before the BIA and has evidenced no intent that the APA not apply to BIA proceedings. Indeed, the legislative history shows just the opposite – that Congress intended the APA to apply to proceedings before the BIA. *See Giambanco v. Immigration and Nat. Service*, 531 F.2d 141, 153 (1976) (Judge Gibbons, in dissent, discusses the legislative history of the INA, including Senator McCarran's statement that the APA should apply to the BIA).

Provisions for appeal from the decision of the initial decisionmaker to the agency are set out in 5 U.S.C. § 557. *See* 5 U.S.C. § 557(b)-(c). Although setting forth elaborate procedures in the INA for deportation hearings, Congress specified no such procedures for proceedings before the BIA – even though the Board had long been in existence when the INA was enacted in 1952. Since Congress evidenced no intent to supersede the APA's appeal provisions, and since there are no provisions in the INA

governing appeals, the APA must be held to govern administrative appeals of deportation hearings.

Since 5 U.S.C. § 554(c)(2) incorporates by reference § 557 of the APA, a proceeding before the BIA is an "adjudication under section 554" for purposes of 5 U.S.C. § 504(b)(1)(C). Therefore, a proceeding before the BIA is an "adversary adjudication" for which EAJA fees are authorized. *See* 28 U.S.C. § 2412(d)(3).

Moreover, specific language in § 554(a) supports the argument that the APA governs proceedings before the BIA. As indicated above, that section states that the APA will apply "in every case of adjudication required by statute to be determined on the record after an opportunity for an agency hearing." Before an alien may seek federal court review of a final order of deportation under 8 U.S.C. § 1105a(a), INA § 106(a), he or she is required by statute to exhaust all "administrative remedies . . . available to him as of right under the immigration laws and regulations . . . ". 8 U.S.C. § 1105a(c), INA § 106(c). Section 106(c)'s provision would be unnecessary unless the statute contemplated BIA review since a final order of deportation can only be entered after a decision by an Immigration Judge. Thus, since the BIA proceeding is required by § 106(c), and since Congress did not replace the appellate procedures of the APA with more specific provisions in the INA, § 554 must be held to govern appeal proceedings before the Board of Immigration Appeals and EAJA is applicable to those proceedings.

4. A determination that the APA does govern the BIA would make an inquiry into the meaning of "adversary adjudication. . . . under section 554", the issue dividing the circuits in *Escobar-Ruiz*, *Ardestani*, and *Clarke*, unnecessary. In the instant case, when the Court can decide the case on a ground altogether separate than the one currently dividing the circuits, the writ of certiorari should be denied. See *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation"); *See also* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 201 (6th ed. 1986) *citing Sanson Hosiery Mills v. NLRB*, 344 U.S. 863 (1952) and *The Arlington, Inc. v. Mayer*, 339 U.S. 965 (1950).

5. Finally, petitioner has asked this court to hold this case pending the disposition of *Ardestani*. However, as shown above, even if *Ardestani* were to be affirmed, it would not dispose of the issue presented in this case. Therefore, this Court should not hold the instant case pending the disposition of *Ardestani* but, rather, should deny the petition.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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